The magistrate found the respondent guilty and ordered that he be bound over in the sum of $300 for a period of one year under section 173A Criminal Procedure Code without recording a conviction.

The fact that the respondent behaved in a disorderly manner whilst carrying a firearm has been clearly established. To my mind, that constitutes an unwarranted abuse of the privilege granted to him to own a firearm and it further constitutes a serious breach of the conditions and the law governing possession of firearm. It is needless to say that a person authorised to possess a firearm must at all times comply with the law.

The law provides a penalty of imprisonment not exceeding six months and a fine not exceeding $500 or to both fine and imprisonment.

In his grounds of judgment, the magistrate stated that the respondent was a man of good repute and a successful businessman and was certainly not irresponsible. The respondent's goodness of character was also assumed by the magistrate considering that he was issued with a gun licence. To my mind, the reasoning was illogical. The magistrate had at no time considered the public interest.

The facts reveal that on 27 November 1971 at night, the respondent in the company of two others stopped his car in front of the complainant's house and asked for the complainant's brother. The respondent told the complainant to ask her brother to come out, at the same time the respondent pulled the revolver out of his trouser pocket, showed it to her and said that he would kill her brother.

In the light of the proved facts and circumstances of this case, it is clear that the magistrate had erred in law and in fact in making the order that the respondent be bound over for good behaviour for one year in the sum of $300 under section 173A of the Criminal Procedure Code. The sentence is manifestly inadequate. I allow the appeal.

I therefore set aside the order, record a conviction, and impose a fine of $500 in default six months' imprisonment.

Appeal allowed.

Solicitors: *Sothi & Ang.*

TIO CHEE HING v. TRACTORS MALAYSIA BHD.

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. & Pawan Ahmad J.) November 20, 1972]

[Kota Kinabalu — Federal Court Civil Appeal No. 73 of 1972]

Practice and Procedure — Application to set aside consent judgment — Fresh action — Whether consent judgment operates as estoppel — Exceptions — Whether no reasonable cause of action — Whether action frivolous or vexatious — Triable issues — R.S.C. 1957, O. 25 r. 4.

In this case the respondents had obtained a consent judgment against the appellant. The appellant applied in the same action to set the judgment aside, but the application was dismissed. Subsequently the appellant brought an action to set aside the consent judgment in the former action. The learned trial judge set aside the writ of summons and all subsequent proceedings in the action on the grounds that the appellant was estopped from bringing the action and that the action was frivolous and vexatious. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) although as a general rule a consent order would operate as an estoppel, there are clear exceptions to this rule. A consent order may be set aside for the reasons sufficient to set aside an agreement;

(2) the appellant's statement of claim raised triable issues which were *prima facie* sustainable and it could not be said that it disclosed no reasonable cause of action. The action should therefore have been allowed to proceed to trial.

Cases referred to:-

(1) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.

(2) *Attorney-General* v. *Tomline* (1877-8) 7 Ch. D. 388.

(3) *Hudders Field Banking Co. Ltd.* v. *Henry Lister & Sum Ltd.* [1895] 2 Ch. 273, 283.

(4) *Wilding* v. *Sanderson* [1897] 2 Ch. 534.

(5) *Au Yuan Chee* v. *Lim Leng Thiam & others* (1956) 2 M.C. 260.

(6) *Attorney General of Duchy of Lancaster* v. *London and North Western Rly Co.* [1892] 3 Ch. 274.

(7) *Young* v. *Holloway and another* [1895] P. 87.

(8) *Gugenheim* v. *Lordbroke & Co. Ltd.* [1947] 1 All. E.R. 292.

(9) *Lovell* v. *Williams* (1939) 62 Ll. L.R. 249.

(10) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 419.

FEDERAL COURT.

S. S. Lee (*Shelley Yap* with him) for the appellant.

W. K. Loo for the respondents.

Gill F.J.: This is an appeal by the plaintiff from an order of Lee Hun Hoe J. in Civil Suit No. 199 of 1972 in the High Court in Borneo at Kota Kinabalu, setting aside the writ of summons and all subsequent proceedings in the action on the grounds that the plaintiff was estopped from bringing the action and that the action was frivolous and vexatious. Another ground on which the defendants sought to set aside the action was that the writ was not indorsed in accordance with Order 3, rule 3 of the Rules of the Supreme Court, 1957, but this ground was rejected.

The action by the plaintiff was brought to set aside a consent judgment in a former action in the same court, being Civil Suit No. 190 of 1969, in which the present defendants, Tractors Malaysia Berhad (hereinafter referred to as the "respondents"), were the plaintiffs and the present plaintiff, Tio Chee Hing (hereinafter referred to as the "appellant"), was the defendant.

For this judgment to be intelligible, it is necessary to state briefly the facts leading to the former action.

On October 1, 1967, at the appellant's request, the respondents hired a number of tractors to Southern Estate Sendirian Berhad, a company which was wholly owned by the appellant and his wife. The said company was at that time undertaking the construction of a satellite town at Lahad Datu. By November, 1968 the company was owing about two million dollars to the respondents in respect of the hiring of such tractors. By an agreement dated November 21, 1968, the appellant guaranteed payment of the company's debt and the respondents agreed not to take legal proceedings for the recovery of such debt on the conditions, *inter alia*, that the guarantor would pay $50,000 a month towards the discharge of the debt and execute a charge or a second charge in favour of the respondents over all the lands owned by him. The appellant having failed to make payment in terms of the agreement, the respondents on October 28, 1969 brought the former action against the plaintiff for the recovery of a sum of $2,052,976.68. The respondents also brought a separate action against the company on the same day, but that action is of no consequence in so far as these proceedings are concerned.

The statement of claim in the former action against the appellant expressly referred to the forbearance by the respondents under the agreement to sue the company and the failure on the part of the appellant to pay the debt. The appellant duly entered an appearance on November 14, 1969, and on December 5, 1969 he filed a statement of defence containing two short paragraphs admitting liabilities to the extent of $718,266.85. On December 16, 1969 the respondents took out a summons in chambers for leave to enter final judgment against the appellant for the sum admitted. Leave was duly granted on December 27, 1969 and judgment entered for the amount.

On January 26, 1970 the respondents, with a view to executing the consent judgment, obtained a prohibitory order in respect of five pieces of land belonging to the appellant which included four pieces of land in the satellite town project. On June 16, 1970 the appellant was examined on a judgment debtor summons as to his ability to pay the debt. On August 28, 1971 the respondents obtained a further prohibitory order in respect of the appellant's land described as Lease No. 10789, and on September 18, 1971 an order was made for that land to be sold by public auction on October 16, 1971. For various reasons the sale was postponed from time to time, and on January 6, 1972 the court granted a further postponement of the auction for two months to enable the appellant to raise funds. Just before the date of sale the appellant applied to have the judgment of December 27, 1969 set aside, but the application was dismissed on March 13, 1972.

The present action by the appellant was commenced on May 16, 1972. The order appealed from was made on July 6, 1972. Before coming to the grounds on which the writ and all subsequent proceedings in the present action were set aside, I must refer to the observation which the learned judge has made regarding the application in the earlier suit itself to have the consent judgment set aside. That observation is to the effect that the appellant never appealed against the dismissal of that application as there was no ground on which he could justifiably succeed. With that observation of the learned judge I agree, but only to the extent that the appeal would have failed solely on the ground that after a judgment has been passed and entered, even though it may have been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose, unless there has been a clerical mistake or an error arising from an accidental slip or omission in the judgment, or the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases an application under Order 28, rule 11 of the Rules of the Supreme Court, 1957 for the rectification of the judgment can be made *in the same action.* (See *Ainsworth* v. *Wilding*[1]).

As neither of the cases to which I have just referred applied to the judgment in the former suit, the application in that suit was rightly dismissed. It has been argued by counsel for the appellant that as the application in the former suit was made wrongly, the order made on it was a nullity and therefore cannot operate as a bar to the present action. I do not think it would be correct to call that order a nullity. As I have attempted to show, that order was rightly made, even though it may have been made for a wrong reason, but I would agree that the present suit is not *res judicata* merely because of that order. To put it in other words, where a final judgment in an action can be set aside only by means of a fresh action, such fresh action is not *res judicata* merely because the attempt to set it aside in the same action failed, as it was bound to fail.

On the question of estoppel, which was one of the reasons for the setting aside of the writ in the present action, the learned judge in his judgment says:

> "So long as the judgment stands, no one who was a party in those proceedings can re-open the matter. See *Hill* v. *Hill* [1954] P. 261; [1954] 1 All E.R. 491. That is what plaintiff is trying to do in this case. I can see no ground for his doing so since the judgment was the result of his admission. He was fully cognizant of the proceedings and clearly bound by estoppel from litigating the same matter in a different form or guise. A judgment by consent or by default, operates as an estoppel between the parties and their privies: *Shaik Sahied bin Abdullah Bajarie* v. *Mootoo Carpen Chitty* (1910) 2 M.C. 16."

Now, although as a general rule a consent judgment would operate as an estoppel, yet there are clear exceptions to this rule. Thus, it was held in *Attorney-General* v. *Tomline*[2] that after a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. In *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.*[3] Lopes L.J. said:

> "The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside."

In *Wilding* v. *Sanderson*[4] the Court of Appeal held, *inter alia*, that an order made in an action by consent and based upon, and intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms

of the order could be set aside, and one of such grounds is mistake. Pretheroe J. followed these last two cases in *Au Yuan Chee* v. *Lim Leong Thiam & Ors.*[5] to hold that where it is established that a judgment has been obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact, the court has power to set aside the judgment.

Having disposed of the question of estoppel, I have now to deal with the other ground on which the order appealed from was made, namely, that the said action was frivolous and vexations. It is clear that the application to set aside the writ in the present action was made under Order 25, rule 4 of the Rules of the Supreme Court, 1957 which reads as follows: —

"The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The appellant's statement of claim in the present action sets out facts in support of his case that he is entitled to have the agreement which he entered into with the respondents on November 21, 1968 rescinded or rectified on the ground of lack of consideration and fraudulent misrepresentation. Those facts are verified in his affidavit which he filed to counter the allegations in the respondents' affidavit in support of their application to have the writ and all subsequent proceedings set aside. Since those facts, if proved, would entitle the appellant to set aside the agreement, he would also be entitled to have the judgment which was founded on that agreement to be set aside. Thus, it would seem clear that the statement of claim raises issues which can only be adjudicated upon at the trial of the action and not decided on the affidavits of the parties to the action. It follows, therefore, that the action should have been allowed to proceed to trial.

I need hardly repeat that once a final judgment has been passed and entered, the court cannot set it aside except in a fresh action brought for that purpose. It is for that express purpose that the present action has been brought. It would be wrong to pre-judge the action on the allegations contained in the affidavits of the parties. For that reason it would be wrong for this court to express an opinion on the merits of the case, and I deliberately refrain from doing so. Suffice it to say that the appellant's statement of claim raises triable issues which are *prima facie* sustainable. It, therefore, cannot be said that it discloses no reasonable cause of action.

As regards the second limb of rule 4, Order 25, Lindley L.J. said in *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.*[6]: —

"To what extent is the court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether."

A.L. Smith L.J. in the same case said at page 278:

"I only want to make one remark about Order XXV., rule 4. It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies."

In *Young* v. *Holloway and Another*,[7] it was held that where the plaintiff was not bound by the result of a previous action, the action brought by him ought not to be dismissed as frivolous. In *Gugenheim* v. *Ladbroke & Co. Ltd.*,[8] the plaintiff in 1946 made bets in England with the defendants, who were bookmakers, and he claimed to have won from them £8,784. The defendants refused to pay this sum of the plaintiff because they understood that he had been reported to the stewards of the Jockey Club as a defaulter on bets and had been warned off the course in England. The defendants having proposed to hold the plaintiff's account in abeyance until he had settled certain alleged liabilities, the parties entered into negotiations as the result of which the plaintiff claimed that the defendants had agreed that a final balance of £7,256 was due to him from them and he began proceedings against the defendants, founding his action on an account stated. It was held that the action should not be struck out under R.S.C., Order 25, r.4, as being frivolous and vexatious, but should go to trial.

In *Lovell* v. *Williams*[9], the plaintiff brought an action in the county court for damages for personal injuries sustained by him in a collision with the defendant's motor-cycle. He accepted a sum of money in full satisfaction and discharge of all claims including any further claims for injuries sustained by him by reason of the alleged negligent driving of the defendant. He subsequently discovered upon further medical examination that the injuries sustained by him were much more serious than had been supposed at the time of the settlement. He therefore commenced an action in the High Court. A summons issued by the defendant that further proceedings be stayed on the ground that they were frivolous and vexatious and an abuse of the process of the court was dismissed by the master but upheld on appeal by the judge. The Court of Appeal restored the master's order. Mackinnon L.J. said at page 251:

"I say nothing as to the possible results of this litigation. It may well be that when the case is tried the defendant will establish to the satisfaction of the tribunal that this was a settlement of all claims then existing and known or likely to be ascertained in the future, and that by reason of the agreement by way of accord and satisfaction then come to, the plaintiff has no claim in this case. That may quite possibly be the result of the hearing of this action, as it was in the case of the *North British Railway Company* v. *Wood*, 18 R.[H.L.] 27. The question we are here concerned with is whether the certainty of that result is so obvious that we ought to prevent the defendant or his insurers being put to the trouble of contesting this further action on the ground that it is obvious.

We are not satisfied that anything of that sort is made out in this case. The master, before whom the summons came first, dismissed the application and thought that the case ought to be allowed to proceed; the learned judge, on appeal from the master, thought that it was a case in which he ought to

stay the action as being an abuse of the process of the court. We unfortunately, differ from the learned judge and agree with the master. We think it is not made out that these proceedings ought to be stayed, although of course we indicate no possible sort of view as to what is likely to be, or ought to be, the result of the action when it is heard. The only question before us is whether we think the action ought to be heard."

Counsel for the respondents concedes that a fresh action can be brought to set aside a final judgment in a previous action, and that a consent judgment may be set aside on the grounds of mistake and fraud, but he has argued that the delay on the part of the appellant in bringing his present action to set aside the judgment against him is fatal. I do not think I can accept that argument for two reasons. First, there would appear to be a reasonable explanation for the delay. Secondly, the plaintiff must be given an opportunity to explain the delay at the trial of the action. As I have already said, it is not open to the court to go into the merits of the case at this stage. It is further argued that the court is entitled at this stage to look into the whole background of the litigation. I do no agree. A point is also made that there is no evidence in support of the plaintiff's claim except for his bare allegation. That, to my mind, is the strongest ground for allowing the appeal, because the evidence can only be produced at the trial of the action.

As was said by Fletcher Moulton L.J. in *Dyson* v. *Attorney-General:*[10]

"Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers."

I would, therefore, allow this appeal with costs both here and in the court below and set aside the order appealed from.

Ismail Khan C.J. (Borneo) and **Pawan Ahmad J.** concurred.

Appeal allowed.

KONG KIM SHING v. PUBLIC PROSECUTOR

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) December 5, 1972]

[Kuching — Federal Court Criminal Appeal No. 12 of 1972]

Internal Security — Proclamation of security area — Whether ultra vires.

Criminal trial — Emergency (Criminal Trials) Regulations, 1964, reg. 4 — Trial by a judge sitting alone — Whether ultra vires Emergency (Essential Powers) Act, 1964 or art. 8(1) of Federal Constitution — Internal Security Act, 1960.

This was an appeal against the conviction of the appellant for the offences of carrying a firearm and being in control of cartridges in a security area, an offence under the Internal Security Act, 1960. The appellant was tried before a judge sitting alone and found guilty. On the appeal it was argued (a) that the proclamation of the security area was *ultra vires* section 47 of the Internal Security Act as it was made in respect of the whole of the Federation; (b) that the Emergency (Criminal Trials) Regulations, regulation 4, under which the appellant was tried and convicted was *ultra vires* the Emergency (Essential Powers) Act, 1964 and/or article 8(1) of the Federal Constitution.

Held: (1) even if the proclamation is to be regarded as applying to the whole Federation, it was not *ultra vires* the Internal Security Act 1960;

(2) the Emergency (Criminal Trials) Regulations (regs. 4 and 5) are not *ultra vires* section 2(2)(d) of the Emergency (Essential Powers) Act, 1964 or of article 8(1) of the Federal Constitution.

Cases referred to:-

(1) *Maebeth* v. *Ashley* 1 Rettie H.L. 14 at p. 16-20.

(2) *The Zamora* [1916] A.C. 77 at p. 107.

(3) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(4) *Osman & Anor.* v. *Public Prosecutor* [1968] 2 M.L.J. 137.

FEDERAL COURT.

C. T. Wong for the appellant.

Mohamed Jemuri bin Serjan (Asst. State Attorney-General) for the respondent.

Ismail Khan C.J. (Borneo): We dismissed the appeal and indicated that we would give our reasons. We now give our reasons for dismissing the appeal.

The accused was charged in the High Court at Sibu as follows:

First:

"That you on 13th June, 1971, at about 8.00 p.m. or thereabout in a security area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N.(F) 162 dated 11th September, 1964, namely at Bukit Asek Road, Sibu, in the Third Division, Sarawak, without lawful excuse carried a firearm, to wit, a home-made shotgun, without lawful authority therefor and you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960".

And Secondly:

"That you on 13th June, 1971, at about 8.00 p.m. or thereabout in a security area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N.(F) 162 dated 11th September, 1964, namely at Bukit Asek Road, Sibu, in the Third Division, Sarawak, without lawful excuse had under your control 4 rounds of live cartridges without lawful authority therefor and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960".

The facts of the case, briefly, are as follows. At about 8.00 p.m. on the 13th June, 1971, five members of the Field Force were carrying out checking and patrol duties at Bukit Asek Road, Sibu, Sarawak. Bukit Asek Road was a security area. The accused was seen cycling from Bukit Asek Road in the direction of the town, and carrying a green plastic bag. On being challenged, he dropped the cycle and the bag and ran back to Bukit Asek Road. One of the constables gave chase and caught up with him. The plastic bag was found to contain a home-made gun, four live cartridges and a plastic water-bottle. The gun was capable of discharging pellets from one of the cartridges.

At the close of the case for the prosecution the accused was called for his defence. The defence was merely a denial that he carried the home-made gun and ammunition. He admitted having passed the soldiers but said that one of them caught hold of the handlebar of his cycle and he was pushed into a drain. He ran away as he was afraid of soldiers. At the police station he was shown a gun and was told that it belongd to him which he denied. In short, the defence was that the gun and the ammunition were planted on him.